

2009

Collier Management & Development Company,  
Inc. v. Jason R. Fox; Marilyn Fox; Steven R. Fox;  
christ Wright; and Noble House Series C, LLC :  
Brief of Appellee

Utah Court of Appeals

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Steven Fox; Jason Fox; Appellants Pro Se.

Robert W. Hughes; Attorney for Appellee.

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IN THE COURT OF APPEALS IN AND FOR THE  
STATE OF UTAH

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**COLLIER MANAGEMENT &  
DEVELOPMENT COMPANY, INC.,**

Plaintiff and Appellee,

vs.

**JASON R. FOX; MARILYN FOX;  
STEVEN R. FOX; CHRIS WRIGHT;  
and NOBLE HOUSE SERIES C, LLC,**

Defendants and Appellants.

**APPELLEE'S BRIEF**

Appellate Court Case No.  
20090843-CA

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Appeal from the Third Judicial District Court  
In and For Salt Lake County, State of Utah

Judge Kate Toomey  
Civil No. 080926818

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JUL 06 2010

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**IN THE COURT OF APPEALS IN AND FOR THE  
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## **APPENDIX**

Appendix 1: Amended Trust Deed Note dated December 29, 2007

Appendix 2: Order Approving Stipulation for Dismissal with  
Prejudice of Adversary Proceeding and Granting  
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dated April 8, 2010 issued by the United States  
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Appendix 3: Order of Summary Judgment dated September 9, 2009

Appendix 4: Mailing Certificate attached to Motion for Summary Judgment  
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Appendix 5: Declaration of Jason Fox in Opposition to Notice to Submit  
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Appendix 6: Third District Court, Salt Lake County, State of Utah,  
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Appendix 7: Declaration of Steven Fox in Opposition to Submission of  
Motion for Summary Judgment or Motion for Judgment  
on the Pleadings for Decision dated August 18, 2009

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**IN THE COURT OF APPEALS IN AND FOR THE  
STATE OF UTAH**

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COLLIER MANAGEMENT &  
DEVELOPMENT COMPANY, INC.,

Plaintiff and Appellee,

vs.

JASON R. FOX; MARILYN FOX;  
STEVEN R. FOX; CHRIS WRIGHT; and  
NOBLE HOUSE SERIES C, LLC,

Defendants and Appellants.

**APPELLEE’S BRIEF**

Appellate Court Case No.  
20090542

Appellee, Collier Management & Development Company, Inc. (hereinafter “Collier Management”) hereby submits its Appellee’s Brief.

**STATEMENT OF JURISDICTION**

The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. §78A-3-102(3)(j). The Utah Supreme Court has transferred this appeal to the Utah Court of Appeals pursuant to Utah Code Ann. §78A-3-102(4). The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78A-3-102(2)(j).

**CONSTITUTIONAL OR STATUTORY PROVISIONS**

There are no constitutional or statutory issues to be decided in this Appeal.



## **STATEMENT OF THE CASE**

Appellants', Steven Fox and Jason Fox, (hereinafter referred to individually by name or collectively as "Fox") "Statement of the Case" does not adequately provide this Court with an accurate history of this case. Collier Management submits the following:

1. On or about December 29, 2007, Steven Fox, Jason Fox, Chris Wright, Marilyn Fox, and Noble House Series C, executed an Amended Trust Deed Note ("the Note") in favor of Collier Management, a copy of the Note is attached hereto at Appendix 1.

2. The Note provided for the payment of the principal amount of \$750,000.00, plus interest at the rate of 2.5 percent per month. The Note also provided that in the event of default interest would accrue at the rate of 24 percent per annum, a penalty of 10 percent of the outstanding principal would accrue, and that the defaulting party would be responsible for all costs and attorney's fees associated with the collection of the Note. (See Appendix 1.)

3. Steven Fox, Jason Fox, Marilyn Fox, Chris Wright, and Noble House Series C, individually and unconditionally, guaranteed the full performance of each and every term and condition of the Note. The Note specifically provided that upon any event of default that was not cured pursuant to the Note, Collier Management could proceed directly against Steven Fox, Jason Fox, Marilyn Fox, Chris Wright, and

Noble House Series C as guarantors without proceeding against the signer of the Note. (See Appendix 1.)

4. Based upon the failure of Fox and the other guarantors of the Note to pay the Note upon default, Collier Management filed an action in the Third District Court, Salt Lake County, State of Utah.

5. Collier Management obtained a default judgment against Chris Wright<sup>1</sup> on February 26, 2009 and a default judgment against Noble House Series C on May 5, 2009.

6. Marilyn Fox filed a petition in bankruptcy with the United States District Court in and for the Central District of California on May 9, 2009 under Case No. 8:09-bk-14361-ES, and, as such, is protected by the automatic stay provisions of the United States Bankruptcy Code. Steven Fox, Jason Fox, and Marilyn Fox filed an adversary proceeding against Collier Management in the United States District Court in and for the Central District of California seeking to set aside the judgment rendered against Fox. The adversary proceeding was dismissed with prejudice on April 8, 2010. A copy of the Bankruptcy Court's Order is attached hereto at Appendix 2.

7. On July 15, 2009, Collier Management filed a Motion for Summary Judgment against Fox, which Motion was not responded to by Fox. The Third

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<sup>1</sup> Chris Wright is presently incarcerated in the Salt Lake County Jail.

District Court granted Collier Management's Motion for Summary Judgment and entered an Order of Summary Judgment against Fox on September 9, 2009. A copy of the Order of Summary Judgment is attached hereto at Appendix 3.

8. Fox's appeal of the September 9, 2009 Order of Summary Judgment is based upon Steven Fox's claim that "he was never served with the moving papers on the summary judgment motion" (Appellant's Brief, page 5) and Appellant Jason Fox's claim that "the summary judgment papers were misplaced" (Appellant's Brief, page 5). Collier Management's Motion for Summary Judgment was mailed to both Steven Fox and Jason Fox on July 13, 2009. A copy of the Mailing Certificate attached to Collier Management's Motion for Summary Judgment is attached hereto at Appendix 4.

9. The Motion for Summary Judgment filed by Collier Management in the trial court was not responded to by Fox. As a result, Collier Management's facts are uncontroverted. See Utah R. Civ. P. 56(e). Any challenge to the facts at this stage is waived. Luke v. Redko International, 2005 UT App 517 (UT 12/1/2005), 2005 UT App 517 (UT, 2005).

10. Fox alleges that the "trial court never conducted a hearing on the request of appellants for leave to serve and file substantive opposition, and the court never directly ruled on the declarations submitted by the appellants to the effect that they had not received notice of the summary judgment" (Appellants' Brief, page 5). Rule 7(e) of the Utah Rules of Civil Procedure provides, in relevant part:

The court *may* hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be *separately identified in the caption of the document* containing the request (Emphasis added.)

Fox did not request a hearing before the trial court, nor was the trial court required to conduct a hearing on Fox's oppositions.

11. The trial court properly entered its Order on Summary Judgment on September 9, 2009.

### **RESPONSE TO STATEMENT OF FACTS**

Fox's "Statement of Facts" are not set forth in numbered paragraphs and appear to contain more "argument" than "facts". As such, Collier Management will respond to Fox's "Facts" in the order presented by Fox.

1. Fox states at page 6 of their Brief:

The complaint alleges that appellants are liable to plaintiff on a promissory note. Appellants contend that there was no debtor/creditor relationship between appellants and Collier Management and that the relationship, base [sic] upon the underlying documents executed by the parties, amounted to a partnership or joint venture for the development of a parcel of real property located in Idaho. The documentation, prepared by Collier Management, suggests that a loan was made by Collier Management to an entity known as Sunrise Oaks Capital Fund, LLC, a Utah limited liability company, which is not a party to this case. The underlying documents show that the Sunrise entity was the principal obligor on any loan, and if the documents are to be construed as loan agreements, the appellants were only secondarily liable as guarantors.

RESPONSE: It is undisputed, and the trial court held, that Fox executed the subject Amended Trust Deed Note and the Note is in default. No other evidence was presented by Fox to the trial court. Therefore, Fox is precluded from presenting “new” facts on Appeal. “To preserve an issue for appeal, a party must first raise the issue before the trial court and give the trial court the opportunity to rule on the matter.” In re T.G., 2010 UT App 70 (Utah App., 2010).

For clarification, on or about December 29, 2007, said Defendants executed an Amended Trust Deed Note (“the Note”) in favor of Plaintiff. (See Appendix 1 hereto.)

The Note provides, in relevant part:

NOW, THEREFORE, FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC. at 880 South Main Street, Bountiful, Davis County, State of Utah, or at such other place as the holder hereof may designate, the sum of SEVEN HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$750,000.00). This note shall bear interest at the rate of two and one-half percent (2.5%) per month.

...

JASON FOX, MARILYN FOX, STEVE FOX, CHRIS WRIGHT, and NOBLE HOUSE SERIES C, LLC (collectively “Guarantors”) for good and valuable consideration, the adequacy and receipt of which is acknowledged, individually, absolutely and unconditionally, guarantees the full performance of each and every term and condition of this Amended Trust Deed Note by the undersigned, its successors and

permitted assigns, including any amendments, modifications, extensions, or alterations thereto subsequently made. This is a continuing guaranty and the Guarantors agree that their liability hereunder shall not be affected by the liquidation or change of ownership or officers of the undersigned. ***Upon any event of default that is not cured pursuant to this Amended Trust Deed Note, COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC. may proceed directly against the Guarantors without proceeding against the undersigned.*** This guaranty may not be modified or terminated other than by agreement in writing signed by COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC., and Guarantors. (Emphasis added.)

Again, it is undisputed that: (1) Fox's signatures are contained on the Note in favor of Collier Management; (2) Fox has failed to provide any evidence that the Note has been paid; and (3) Steven Fox and Jason Fox individually, absolutely and unconditionally guaranteed full performance of each and every term and condition of the Note. Therefore, the trial court's judgment should be affirmed.

With regard to Fox's claim that "the relationship base [sic] upon the underlying documents executed by the parties, amounted to a partnership or joint venture", it is undisputed that the parties executed a Note, not a joint venture and/or partnership agreement. The applicable law where a contract is clear and intended to be a final expression of the parties' bargain is clear:

In interpreting a contract, we look to the writing itself to ascertain the parties' intentions, and we consider each contract provision in relation to all of the others, with a view toward giving effect to all and ignoring none.

If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law....

WebBank v. American General Annuity Service Corp., 2002 UT 88, ¶¶18-20, 54 P.3d 1139, citing Peterson v. Sunrider Corp., 2002 UT 43, ¶19, 48 P.3d 918.

In this case, we do not confront unclear language or omitted language, but rather Fox's unsupported claim that the documents executed by the parties amounted to a joint venture or partnership. Fox executed the Note, which is exactly what the parties intended.

2. Fox states at page 6 of their Brief:

Appellants have learned from discovery undertaken in the Fox bankruptcy case that a secret agreement existed between Collier and Sunrise such that Collier will not look to Sunrise for repayment of the loan.

RESPONSE: Fox has provided no evidence of any "secret agreement", nor has Fox provided any documents or testimony derived from "discovery undertaken in the Marilyn Fox bankruptcy case". In fact, Fox made similar claims in an adversary proceeding filed in the Bankruptcy Court, which claim, as noted above, was dismissed with prejudice by Fox. The Note, contrary to Fox's assertions, did not prevent Collier Management from "*proceed[ing] directly against the Guarantors without proceeding against the undersigned [Sunrise].*"

3. Fox continues at page 6 of their Brief:

Furthermore, appellants have learned through deposition discovery in the Fox bankruptcy case that apparently plaintiff and Collier Management now owns and controls the Idaho property, and has refused to credit to the loan amount the fair market value of that property.

RESPONSE: Fox provided the trial court no testimony or evidence regarding Collier Management's alleged ownership and control over property in Idaho.

4. At page 7 of their Brief; Fox states:

Finally, appellants urge that even if the transaction is construed as a loan, they are not liable to Collier Management on any debt instrument unless and until Collier Management exhausts its remedies for collection of the loan against the principal obligor, Sunrise.

RESPONSE: As noted above, the Note executed by Fox specifically provides:

JASON FOX, MARILYN FOX, STEVE FOX, CHRIS WRIGHT, and NOBLE HOUSE SERIES C, LLC (collectively "Guarantors") for good and valuable consideration, the adequacy and receipt of which is acknowledged, individually, absolutely and unconditionally, guarantees the full performance of each and every term and condition of this Amended Trust Deed Note by the undersigned, its successors and permitted assigns, including any amendments, modifications, extensions, or alterations thereto subsequently made. This is a continuing guaranty and the Guarantors agree that their liability hereunder shall not be affected by the liquidation or change of ownership or officers of the undersigned. *Upon any event of default that is not cured pursuant to this Amended Trust Deed Note, COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC. may proceed directly against the Guarantors without proceeding against the undersigned.* This guaranty may not be modified or terminated other than by agreement in writing signed by COLLIER



MANAGEMENT & DEVELOPMENT COMPANY,  
INC., and Guarantors. (Emphasis added.)

The Note does *not* provide that Collier Management is required to seek payment from the signor of the Note before seeking payment from the guarantors, and, in fact, specifically provides that Collier Management “may proceed directly against the Guarantors without proceeding against the undersigned [Sunrise Oaks Capital Fund]”. The guaranty executed by Fox was absolute and Collier Management was in no way required to first seek payment from Sunrise Oaks Capital Fund, LLC.

5. Fox continues at page 7 of their Brief:

If the trial court were to deny the appellants’ defense under suretyship law that Collier Management must proceed first against the principal obligor, Sunrise, appellants are still entitled to contribution over against Sunrise for whatever may be the obligation of appellants to Collier Management Collier because of Sunrise’s liability as principal obligor on the underlying loan.

. . . At the very least, as a result of the summary judgment, Collier Management has been unjustly enriched because it now has a judgment against appellants Fox and controls the Idaho property as to which the loan documents provided that appellants were to be granted an option to acquire the entire interest in the Idaho property, without any participation by Collier or Sunrise.

RESPONSE: The issues of “suretyship” and “unjust enrichment” are raised for the first time on appeal and must be disregarded. To preserve a substantive issue for appeal, a party must first raise the issue before the trial court, thus providing the court an opportunity to rule on the issue’s merits. Issues not raised in the trial court

in timely fashion are deemed waived, precluding an appellate court from considering their merits on appeal. Ohline Corp. v. Granite Mill, 849 P.2d 602, 604 n. 1 (Utah Ct. App. 1993). Fox, by not raising the issues of suretyship and unjust enrichment below, waived their ability to raise these issues for the first time before this Court.

Notwithstanding the fact that the issue of suretyship cannot be raised here, Fox's argument that Collier Management "must proceed first against the principal obligor" is without merit based upon the fact that the guaranty signed by Fox was absolute.

6. Fox proposes at page 7 of their Brief:

The defenses that appellants raise here on this appeal for purposes of demonstrating how they would have been able to provide substantive defense to the summary judgment motion, are defenses that debtor Marilyn Fox now asserts against Collier and Sunrise in her bankruptcy case. Debtor Marilyn Fox stands in the same position as appellants Jason Fox and Steven Fox with respect to the underlying investment documents. That is, Collier Management claims that debtor Marilyn Fox was a co-guarantor of the underlying loan that appellee Collier made to Sunrise. In the bankruptcy case, debtor claims that there was no debtor-creditor relationship between the parties, and that the underlying documents should be construed as a joint venture or partnership between and among Collier Management, Sunrise, appellants, and debtor Marilyn Fox, such that no claim can be asserted by Collier Management against any alleged guarantor unless and until there is a dissolution, winding up, and accounting of the business and financial affairs of the joint venture or partnership.

As noted above, Fox provides no evidence of any “joint venture or partnership”. Like “suretyship” and “unjust enrichment”, Fox raises the issue of “joint venture or partnership” for the first time on appeal. Fox is precluded from raising this issue for the first time before this Court on appeal.

Notwithstanding the fact that the issue of “joint venture or partnership” cannot be raised here, Fox’s argument that the execution of the Note as guarantors “should be construed as a joint venture or partnership” is without merit based upon the fact the relationship between Fox and Collier Management is one of debtor-creditor as unambiguously demonstrated by the Note.

### **ADDITIONAL FACTS**

1. The following “factual summary” is taken from Fox’s Docketing Statements<sup>2</sup>:

Plaintiff filed a motion for summary judgment. Defendants were not served with the moving papers. When defendants discovered the motion filing, they asked the court to have of [sic] file opposition. This written request was not acted on by the court and defendants were not given a hearing on their request. The trial court there upon entered summary judgment without considering defendants’ request to file

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<sup>2</sup> Steven Fox and Jason Fox are the only Appellants on this Appeal. Steven Fox and Jason Fox submitted separate, yet identical Docketing Statements. For the purpose of this Appeal, Collier Management’s will cite only one of the Docketing Statements.

opposition. The motion, on its face, disclosed viable issues of material facts.

(See Docketing Statement, page 19.)

2. Fox's "factual summary" is inaccurate. Fox states that "Defendants were not served with the moving papers". Jason Fox, states:

I did not discover the moving papers on the underlying motion for summary judgment, or in the alternative, motion for judgment on the pleadings, until September 17, 2009, when I received by mail plaintiff's notice to submit for decision, affidavit of attorney's fees and proposed judgment. I then immediately made inquiry of my wife, who told me for the first time that apparently the *moving papers on the underlying motion had arrived while I was away on business and she had simply put them in a two-drawer file which I maintain in my office*, and had forgotten to bring that mail to my attention when I returned to Utah. (Emphasis added.)

(Declaration of Jason Fox in Opposition to Notice to Submit Summary Judgment or in the Alternative Motion for Judgment on the Pleadings for Decision ("Jason Fox's Declaration") at ¶6. A copy of Jason Fox's Declaration is attached hereto at Appendix 5.)

3. Fox also represents to this Court that "When defendants discovered the motion filing, they asked the court to have of [sic] file opposition". This statement is also inaccurate. Appellants did not file a motion with the trial court requesting a continuance. In fact, the only reference to a request for additional time to respond to the Motion for Summary Judgment was contained in the last paragraph of Jason Fox's Declaration:

I request leave of court to be able to respond substantively to the motion within what would otherwise be the statutory time period to opposition [sic] to a motion.

(Jason Fox's Declaration at ¶11, Appendix 5 hereto.) Jason Fox's Declaration, on its face, is insufficient.

4. Appellant does not place at issue the following facts submitted by Collier Management in its Motion for Summary Judgment and Memorandum in Support

(a) On or about December 29, 2007, Steven Fox, Jason Fox, Chris Wright, Marilyn Fox, and Noble House Series C, LLC, executed an Amended Trust Deed Note ("the Note") in favor of Collier Management. (Appendix 1 hereto.)

(b) The Note provides, in relevant part:

NOW, THEREFORE, FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC. at 880 South Main Street, Bountiful, Davis County, State of Utah, or at such other place as the holder hereof may designate, the sum of SEVEN HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$750,000.00). This note shall bear interest at the rate of two and one-half percent (2.5%) per month.

(c) The Note, at page 3, provides, in relevant part:

JASON FOX, MARILYN FOX, STEVE FOX, CHRIS WRIGHT, and NOBLE HOUSE SERIES C, LLC (collectively "Guarantors") for good and valuable consideration, the adequacy and receipt of which is acknowledged, individually, absolutely and

unconditionally, guarantees the full performance of each and every term and condition of this Amended Trust Deed Note by the undersigned, its successors and permitted assigns, including any amendments, modifications, extensions, or alterations thereto subsequently made. This is a continuing guaranty and the Guarantors agree that their liability hereunder shall not be affected by the liquidation or change of ownership or officers of the undersigned. Upon any event of default that is not cured pursuant to this Amended Trust Deed Note, COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC. may proceed directly against the Guarantors without proceeding against the undersigned. This guaranty may not be modified or terminated other than by agreement in writing signed by COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC., and Guarantors.

(d) On or about May 21, 2009, Collier Management submitted Requests for Admissions to Fox. The Requests for Admissions requested that Fox admit or deny the following:

REQUEST NO. 2. Admit that the Note provided for the payment of the \$750,000.00 principal amount of the Note as follows:

(1) Monthly interest for December on the Note shall be pro-rated and added to this Amended Trust Deed Note, and interest from the date of this Amended Trust Deed Note through December 31, 2007 on the additional amount shall be paid on or before December 29, 2007.

(2) Monthly interest shall be paid on or before January 29, 2008.

(3) Monthly interest shall be paid on or before February 29, 2008.

(4) Monthly interest shall be paid on or before March 29, 2008.

(5) Monthly interest shall be paid on or before April 29, 2008.

(6) Monthly interest shall be paid on or before May 29, 2008.

(7) The remaining unpaid balance, including principal, unpaid accrued interest, costs, and fees, shall be paid in full on or before June 29, 2008.

REQUEST NO. 5. Admit that the Note provides for the payment of interest at the rate of twenty four percent (24%) per annum upon default.

REQUEST NO. 6. Admit that the Note provides for the payment of a penalty of ten percent (10%) of the outstanding principal balance.

REQUEST NO. 7. Admit that the Note provides that these Defendants “for good and valuable consideration, the adequacy and receipt of which is acknowledged, individually, absolutely, and unconditionally, guarantees the full performance of each and every term and condition of this Amended Trust Deed Note”.

REQUEST NO. 8. Admit that the Note provides that Plaintiff may proceed directly against the Defendants as guarantors of the Note without proceeding against Sunrise Oaks Capital Fund, LLC.

(e) To each of the foregoing requests, Fox admitted that “the original note is the best evidence of what it provides”.

(f) Request No. 3 of Collier Management's Requests for Admissions provided:

REQUEST NO. 3. Admit that these Defendants have failed to pay the Plaintiff as provided by the Note.

Fox admitted that they have failed to pay the Note.

### **SUMMARY OF ARGUMENT**

Collier Management was granted summary judgment against Fox based upon Fox's failure to pay the Note. There are no disputed material facts which would warrant the setting aside of the summary judgment.

### **ARGUMENT**

#### **A. Fox has Failed to Marshal the Evidence.**

It has been held that the process of marshaling the evidence on appeal is fundamentally different from that of presenting the evidence at trial. The challenging party must "temporarily remove its own prejudices and fully embrace the adversary's position; he or she must play the 'devil's advocate'." Harding v. Bell, 2002 UT 108, ¶ 19, 57 P.3d 1093. In so doing, appellants must present the evidence in a light most favorable to the trial court. Utah Med. Prods., Inc. v. Searcy, 958 P.2d 228, 232 (Utah 1998). As demonstrated below, Fox has failed to marshal the evidence.

#### **B. Fox Failed to File a Rule 60(b) Motion with the Trial Court.**

Fox's two (2) paragraph Argument begins with the following paragraph:

This is a simple case where appellants have been denied procedural due process. Utah Rules of Civil Procedure, Rule 60(b) provides that, upon motion and on upon such



terms as are just, the court may, upon furtherance of justice, relieve a party or his legal representative from a final judgment, order or proceedings based upon mistake, inadvertence, surprise or excusable neglect; newly discover evidence; fraud, whether intrinsic or extrinsic, misrepresentation or misconduct of an adverse party; the judgment is void ; or any other reason justifying relief from the judgment.

Fox, however, did not file a Rule 60(b) Motion with the Trial Court. (See the Trial Court docket attached hereto at Appendix 6.)

To preserve a substantive issue for appeal, a party must first raise the issue before the trial court. See West One Bank, Utah v. Life Ins. Co., 887 P.2d 880, 882 n. 1 (Utah Ct App 1994). ““A matter is sufficiently raised if it is submitted to the trial court, and the court is afforded an opportunity to rule on the issue.”” State v. Starnes, 841 P.2d 712, 716 (Utah Ct App 1992). For a court to be “afforded an opportunity to rule on the issue,” several requirements must be met. First, the issue must be raised in a timely fashion. This Court has explained:

To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. ‘Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal.’

Online Corp. v. Granite Mill, 849 P.2d 602, 604 n. 1 (Utah Ct.App.1993).

As noted above, Fox failed to raise a Rule 60(b) Motion with the trial court. Accordingly, Fox failed to ‘timely bring the issue to the attention of the trial court’

and therefore, as a matter of law, waived their ability to raise this issue for the first time before this Court.

Second, the issue must be specifically raised, see State v. Whittle, 780 P.2d 819, 820-21 (Utah 1989), such that the issue is sufficiently raised to a “level of consciousness” before the trial court. See James v. Preston, 746 P.2d 799, 802 (Utah Ct.App.1987). Fox submits that they “presented such an application [60(b) Motion] in the form of their sworn declarations” (Appellants’ Brief, page 8) filed with the trial court. The respective declarations of the Jason Fox and Steven Fox provided:

*I give this declaration in opposition to the notice to submit for decision with respect to plaintiff’s summary judgment motion or in the alternative, motion for judgment on the pleading, which I received my mail form attorney Robert Hughes on August 17, 2009. (Emphasis added) (Paragraph 3, Jason Fox’s Declaration, Appendix 5.)*

*I give this declaration in opposition to the motion for summary judgment or in the alternative, motion for judgment on the pleadings, which is the subject of the notice to submit for decision, dated August 4, 2009. (Emphasis added) (Paragraph 2, Steven Fox’s Declaration, Appendix 7.)*

Fox clearly failed to specifically raise the issue of a 60(b) motion. It is also pertinent to note that the Fox’s respective Declarations were filed with the trial court on August 18 and 19, 2009. The Order of Summary Judgment was entered by the Trial Court on September 9, 2009. As such, the Declarations cannot be characterized as Rule 60(b) Motions since no order or judgment had been entered at the time the

Declarations were filed. (“On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a *final* judgment, order, or proceeding”, Rule 60(b) of the Utah Rules of Civil Procedure.)

Third, the party must introduce to the trial court “supporting evidence or relevant legal authority” to support its argument. Tolman v. Winchester Hills Water Co., 912 P.2d 457, 461 (Utah Ct.App.1996) (citation omitted); see also West One Bank, 887 P.2d at 882 n. 1 (“The mere mention of an issue in the pleadings ... is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal.” (quoting LeBaron & Assocs., Inc. v. Rebel Enters., Inc., 823 P.2d 479, 482-83 (Utah Ct.App.1991))).

Fox never filed a Rule 60(b) motion after entry of the judgment. Accordingly, any motion made now is not only untimely, but cannot be appealed because it was never raised or preserved in the trial court records.

**C. Fox’s Due Process Argument was not Adequately Briefed.**

Fox’s ‘due process’ argument is referenced only in the “Statement of Issues” section of their brief. (Appellants’ Brief, page 4.) Fox argues that their due process rights were violated because the trial court refused to rule on their application for relief, so as to enable them to submit substantive opposition to the summary judgment motion. In addition to sufficient development of the argument and citation to legal authority, a party must also “provide the appellate court with the parts of the record

that are central to the determination of the issue.” *Id.* Relevant parts of the record may include findings of fact and conclusions of law or the transcript of the court's oral decision.

The application of a due process argument requires a thorough analysis of the circumstances and facts particular to a case. The Utah Supreme Court in V-1 Oil Co. v. Dep't of Env'tl. Quality, 939 P.2d 1192, 1196 (Utah 1997) stated:

The requirements of due process depend upon the specific context in which they are applied because "unlike some legal rules due process is not a technical conception with a fixed content unrelated to time, place, and circumstances." (Cafeteria Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)). Determining the requirements of due process in any given context involves a balancing of three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In this case, Fox has not identified the private interest at stake, the risk of deprivation of that right, or the government interest at stake. For this reason, this Court should decline to engage in such an analysis.

**D. At No Time Did Fox Request an Extension to Respond to Collier Management's Motion for Summary Judgment.**

At no time did Fox request the trial court grant them an extension of time in which to respond to Collier Management's Motion for Summary Judgment or request a hearing before the trial court on the matter.

Fox also represents to this Court that upon discovery of the filing by Collier Management of a Motion for Summary Judgment, they asked the trial court "for leave to serve and file substantive opposition". (Appellants' Brief, page 5.) This statement is inaccurate. Fox did not file a motion with the trial court requesting a extension of time to file a response. In fact, the only reference to a request for additional time to respond to the Motion for Summary Judgment was contained in the last paragraph of Jason Fox's Declaration:

I request leave of court to be able to respond substantively to the motion within what would otherwise be the statutory time period to opposition [sic] to a motion.

(Jason Fox Declaration ¶11, Appendix 5.)

Jason Fox's Declaration, on its face, is insufficient because it did not raise the issue to the level of consciousness of the trial court.

**E. The Trial Court Properly Granted Collier Management's Summary Judgment.**

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Rule 56(c) of the Utah Rules of Civil Procedure.) The following facts are undisputed:

(1) Fox executed the Note (Appendix 1).

(2) The Note provides:

Upon any event of default that is not cured pursuant to this Amended Trust Deed Note, COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC. may proceed directly against the Guarantors without proceeding against the undersigned.

(3) The Note has not been paid.

This Court recently held in the case of Brunson v. Etitle Insurance Agency, Trustee, 2010 UT App 166 (June 17, 2010):

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). At the hearing, it was established as an undisputed fact that Brunson had signed an adjustable rate note setting forth the loan amount and repayment terms and including a promise to pay the amounts due. Brunson admitted that he signed the note at the closing. With that fact established, the trial court did not err in finding that the adjustable rate note constituted a promissory note as a matter of law, and was the promissory note referred to in the trust deed. Based on the undisputed facts, as a matter of law Etitle was entitled to judgment in its favor, which is properly effected by the dismissal of the complaint.

In this case, based upon the undisputed facts, the trial court did not err in granting Collier Management's Motion for Summary Judgment.

**F. Collier Management is Entitled to an Award of its Attorney's Fees Incurred on Appeal.**

In general, attorney fees may be awarded to the prevailing party only if allowed by statute or contract. See Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994). "If provided for by contract, attorney fees are awarded in accordance with the terms of that contract." Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah.Ct.App.1993); accord Holbrook v. Master Protection Corp., 883 P.2d 295, 298 n. 6 (Utah.Ct.App.1994).

In this case, the Note executed by the parties provides:

If this Amended Trust Deed Note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

(See Appendix 1.)

Collier Management was also awarded its costs and attorney's fees by the trial court. (See the Order of Summary Judgment, Appendix 3.)

The Utah Supreme Court in Meadowbrook, LLC v. Flower, 959 P.2d 115 (Utah, 1998) held:

Because we hold in defendants' favor, defendants are also entitled to reasonable attorney fees incurred in this appeal. See R & R Energies v. Mother Earth Indus., Inc., 936 P.2d 1068, 1081 (Utah 1997) (where party entitled to

attorney fees below prevails on appeal, award of attorney fees on appeal is proper); Management Servs. Corp. v. Development Assocs., 617 P.2d 406, 409 (Utah 1980) (holding that contract provision allowing for attorney fees includes those fees incurred on appeal as well as at trial)


As demonstrated above, Collier Management is entitled to recover its attorney's fees and costs incurred on appeal.

### **CONCLUSION**

#### **(A) Relief Sought.**

Based upon the foregoing, Collier Management requests this Court affirm the trial court's granting of summary judgment. Collier Management further requests that it be awarded its attorney's fees and costs incurred on appeal.

RESPECTFULLY SUBMITTED this 6th day of July, 2010.



ROBERT W. HUGHES  
Attorney for Appellee




**CERTIFICATE OF MAILING**

I hereby certify that I mailed two (2) bound copies and one (1) electronic copy of Appellee's Brief, postage prepaid, this 6th day of July, 2010, to the following:

Steven Fox  
18377 Beach Blvd. #215  
Huntington Beach, California 92648

Jason Fox  
1285 East Elk Hollow Road  
North Salt Lake, Utah 84054

A handwritten signature in black ink, consisting of a series of loops and a horizontal line at the bottom, positioned above a solid horizontal line.

# APPENDIX

“1”

## AMENDED TRUST DEED NOTE

*DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing the same, must be surrendered to Trustee for cancellation before reconveyance will be made.*

---

**\$750,000.00**

December 29, 2007

WHEREAS, on June 29, 2007, the undersigned executed a Trust Deed Note wherein the undersigned promised to pay to **COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC.** at 880 South Main Street, Bountiful, Davis County, State of Utah, or at such other place as the holder hereof may designate, the sum of **FIVE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$550,000.00)**, plus interest at the rate of fifteen percent (15%) per annum, on terms provided for in said Trust Deed Note (the "Note").

WHEREAS, undersigned severally waive presentment for payment, demand and notice of dishonor and nonpayment of the Note, and consented to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder thereof with respect to the payment or other provisions of the Note, and to the release of any security, or any part thereof, with or without substitution.

WHEREAS, the undersigned desire to obtain an extension of the Option to Purchase and to obtain additional funds to pay the amount due as provided herein.

WHEREAS, **COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC.**, desires to amend the Note and to advance additional amounts and to accept payment as provided herein.

NOW, THEREFORE, FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of **COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC.** at 880 South Main Street, Bountiful, Davis County, State of Utah, or at such other place as the holder hereof may designate, the sum of **SEVEN HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$750,000.00)**. This note shall bear interest at the rate of two and one-half percent (2.5%) per month.

This Amended Trust Deed Note shall be due and payable to the holder hereof as follows:

- (1) Monthly interest for December on the Note shall be pro-rated and added to this Amended Trust Deed Note, and interest from the date of this Amended Trust Deed Note through December 31, 2007 on the additional amount shall be paid on or before December 29, 2007.
- (2) Monthly interest shall be paid on or before January 29, 2008.
- (3) Monthly interest shall be paid on or before February 29, 2008.

- (4) Monthly interest shall be paid on or before March 29, 2008.
- (5) Monthly interest shall be paid on or before April 29, 2008.
- (6) Monthly interest shall be paid on or before May 29, 2008.
- (7) The remaining unpaid balance, including principal, unpaid accrued interest, costs, and fees, shall be paid in full on or before June 29, 2007.

All payments shall be applied first to accrued interest and then to principal.

This Amended Trust Deed Note may be prepaid at any time without penalty. Any prepayment shall be applied first to accrued interest and then to unpaid principal, unless the undersigned declare otherwise in writing at the time of payment.

This Amended Trust Deed Note shall, at the option of the holder hereof, be immediately due and payable upon the occurrence of any of the following:

- (1) Failure to receive payment due hereunder within five (5) days of its due date.
- (2) Breach of any condition of any security interest, trust deed, pledge agreement or guarantee granted as collateral or security for this Amended Trust Deed Note.
- (3) Breach of any condition of any security agreement, trust deed, or mortgage, if any, having a priority over any security agreement or trust deed on collateral granted, in whole or in part, as collateral security for this Amended Trust Deed Note.
- (4) Upon the filing by any of the undersigned of an assignment for the benefit of creditors, bankruptcy, or for relief under any provisions of the Bankruptcy Code; or by suffering an involuntary petition in bankruptcy or receivership to be filed and not vacated within thirty (30) days.

In the event this Amended Trust Deed Note shall be in default, interest shall accrue on any unpaid balance at the rate of twenty four percent (24%) together with a penalty of ten percent (10%) of the outstanding principal balance.

If this Amended Trust Deed Note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this Amended Trust Deed Note, and consent to any and all extensions of time, renewals, waivers, extensions, or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this Amended Trust Deed Note, and to the release of any security, or any part thereof, with or without substitution.

At any time, and from time to time upon written request, the undersigned, **COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC.** may grant any extension or modification of the terms of this Amended Trust Deed Note.

**JASON FOX, MARILYN FOX, STEVE FOX, CHRIS WRIGHT, and NOBEL HOUSE SERIES C, LLC** (collectively "Guarantors") for good and valuable consideration, the adequacy and receipt of which is acknowledged, individually, absolutely and unconditionally, guarantees the full performance of each and every term and condition of this Amended Trust Deed Note by the undersigned, its successors and permitted assigns, including any amendments, modifications, extensions, or alterations thereto subsequently made. This is a continuing guaranty and the Guarantors agree that their liability hereunder shall not be affected by the liquidation or change of ownership or officers of the undersigned. Upon any event of default that is not cured pursuant to this Amended Trust Deed Note, **COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC.** may proceed directly against the Guarantors without proceeding against the undersigned. This guaranty may not be modified or terminated other than by agreement in writing signed by **COLLIER MANAGEMENT & DEVELOPMENT COMPANY, INC.** and Guarantors.

This Amended Trust Deed Note is secured by a Trust Deed in real property at 1717 East 500 North, St. Anthony, Fremont County, Idaho more particularly described as:

Township 7 North, Range 39 E.B.M., Fremont County, Idaho,  
Section 1: SW1/4 SW1/4; that portion described as follows:  
Beginning at the SW corner of said Section; thence N 00°01'38" W  
along the West line of said Section 1299.41 feet to the NW corner of  
said aliquot part; thence S 89°26'46" E along the North line of said  
part 1106.01 feet; thence S 00°01'15" E 1302.98 feet to the South line  
of said part; thence N 89°15'14" W along said line 1105.90 feet to the  
corner of beginning.

and a Trust Deed in real property at 5811 East Twin Creek Road, Salt Lake City, Salt Lake County, Utah more particularly described as follows:

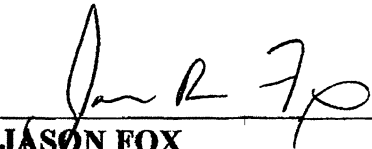
Lot 406, consisting of approximately 9.3 acres, THE ESTATES AT  
EMMIGRATION CANYON PHASE 4 PLANNED UNIT  
DEVELOPMENT according to the official plat thereof on file and of  
record in the office of the Salt Lake County Recorder. Sidwell No.  
10-29-476-008.

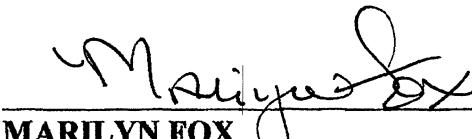
IN WITNESS WHEREOF, the parties have executed this Amended Trust Deed Note as of the day and year first above written.


**SUNRISE OAKS CAPITAL FUND, LLC**


By:   
Dennis G. Heinen, Member

**GUARANTORS:**

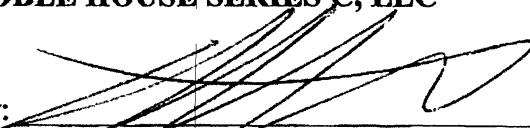
  
JASON FOX

  
MARILYN FOX

  
STEVE FOX

  
CHRIS WRIGHT

**NOBLE HOUSE SERIES C, LLC**

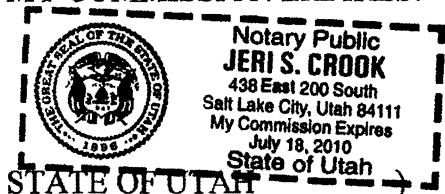
By:   
Chris Wright, Managing Member

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

On this 26<sup>th</sup> day of December, 2007, personally appeared before me DENNIS G. HEINER who duly acknowledged to me that he is a Member of **SUNRISE OAKS CAPITAL FUND, LLC** and is duly authorized and signs the foregoing instrument for and on behalf of **SUNRISE OAKS CAPITAL FUND, LLC**.

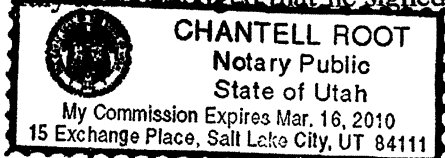
Jeri S. Crook  
NOTARY PUBLIC  
Residing At: Salt Lake County, Utah

MY COMMISSION EXPIRES:



STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

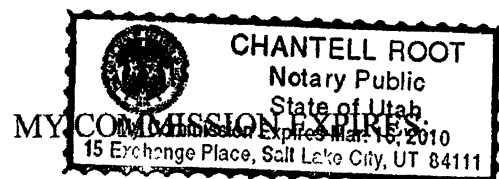
On this 21<sup>st</sup> day of December, 2007, personally appeared before me **JASON FOX**, who duly acknowledged that he signed the foregoing instrument.



MY COMMISSION EXPIRES: 3/16/2010 Chantell Root  
NOTARY PUBLIC  
Residing At: Salt Lake County, Utah

UTAH  
STATE OF ~~CALIFORNIA~~ )  
 ) ss.  
COUNTY OF Salt Lake )

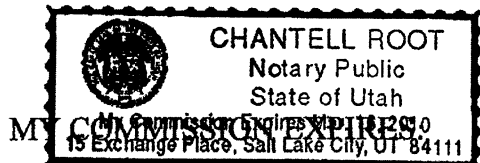
On this 21<sup>st</sup> day of December, 2007, personally appeared before me **MARILYN FOX**, who duly acknowledged that she signed the foregoing instrument.



MY COMMISSION EXPIRES: 03/16/2010 Chantell Root  
NOTARY PUBLIC  
Residing At: Salt Lake County, Utah

STATE OF <sup>UTAH</sup>CALIFORNIA )  
COUNTY OF <sup>Salt Lake</sup> ) ss.

On this 21<sup>st</sup> day of December, 2007, personally appeared before me **STEVE FOX**, who duly acknowledged that he signed the foregoing instrument.

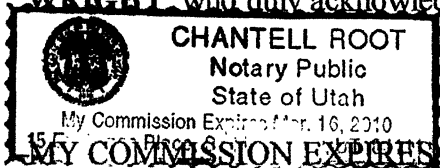


03/16/2010

Chantell Root  
NOTARY PUBLIC  
Residing At: Salt Lake County, Utah

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

On this 21<sup>st</sup> day of December, 2007, personally appeared before me **CHRIS WRIGHT**, who duly acknowledged that he signed the foregoing instrument.

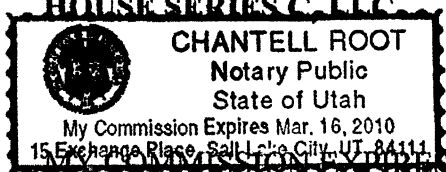


3/16/2010

Chantell Root  
NOTARY PUBLIC  
Residing At: Salt Lake County, Utah

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

On this 21<sup>st</sup> day of December, 2007, personally appeared before me **CHRIS WRIGHT** who duly acknowledged to me that he is the managing member of **NOBEL HOUSE SERIES C, LLC** and is duly authorized and signs the foregoing instrument for and on behalf of **NOBEL HOUSE SERIES C, LLC**.



3/16/2010

Chantell Root  
NOTARY PUBLIC  
Residing At: Salt Lake County, Utah



# APPENDIX

“2”

1 DAVID L. NEALE (SBN 141225)  
IRV M. GROSS (SBN 53659)  
2 LEVENE, NEALE, BENDER, RANKIN & BRILL L.L.P.  
10250 Constellation Blvd., Suite 1700  
3 Los Angeles, California 90067  
4 Telephone: (310) 229-1234  
Facsimile: (310) 229-1244  
5 Email: IMG@Lnbrb.com

FILED & ENTERED

APR 08 2010

CLERK U.S. BANKRUPTCY COURT  
Central District of California  
BY reid DEPUTY CLERK

6 Attorneys for Defendants Collier Management & Development  
Company, Inc., Sunrise Oaks Capital Fund, LLC and  
7 Robert W. Hughes  
8

9 **UNITED STATES BANKRUPTCY COURT**

10 **CENTRAL DISTRICT OF CALIFORNIA**

11 **SANTA ANA DIVISION**

12  
13 In re ) Case No. 09-14361-ES

14 MARILYN FOX, )  
Chapter 11

15 Debtor. ) Adv. No. 8:09-ap-01562-ES

16 )  
MARILYN FOX, JASON FOX, ) **ORDER APPROVING STIPULATION**  
17 STEVEN FOX and NOBLE HOUSE ) **FOR DISMISSAL WITH PREJUDICE**  
SERIES C, LLC, a limited liability ) **OF ADVERSARY PROCEEDING AND**  
18 company, ) **GRANTING DISMISSAL WITH**  
19 ) **PREJUDICE OF ADVERSARY**  
Plaintiffs, ) **PROCEEDING**

20 v. )  
21 ) [No Hearing Required]

22 COLLIER MANAGEMENT &  
DEVELOPMENT COMPANY, INC. a  
23 Utah corporation, SUNRISE OAKS  
CAPITAL FUND, LLC, a Utah limited  
24 liability company, and ROBERT W.  
HUGHES,

25 )  
26 Defendants. )  
27 )  
28 )

OR GOOD CAUSE SHOWN, IT IS HEREBY ORDERED:

1. The parties' "Stipulation For Dismissal With Prejudice Of Adversary Proceeding" is approved in its entirety;
2. The above referenced adversary proceeding shall be, and is, dismissed with prejudice.

###

DATED: April 8, 2010



United States Bankruptcy Judge

1  
2  
3 In re:

MARILYN FOX, et al. v. COLLIER MANAGEMENT, et al

Debtor(s).

Chapter 11 No. 09-14361-ES

Adv No. 8:09-ap-01562-ES

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**PROOF OF SERVICE OF DOCUMENT**

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:  
10250 Constellation Boulevard, Suite 1700, Los Angeles, California 90067

A true and correct copy of the foregoing document described as **ORDER APPROVING STIPULATION FOR DISMISSAL WITH PREJUDICE OF ADVERSARY PROCEEDING AND GRANTING DISMISSAL WITH PREJUDICE OF ADVERSARY PROCEEDING** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

I. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On **March 17, 2010**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

N/A

II. **SERVED BY U.S. MAIL OR OVERNIGHT MAIL**(indicate method for each person or entity served):  
On **March 17, 2010** I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. *Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.*

**VIA U.S. MAIL**

Philip D. Dapeer  
Philip D. Daperr a Law Corporation  
2625 Townsgate Rd., Ste. 330  
Westlake Village, CA 91361

**VIA OVERNITEEXPRESS OVERNIGHT DELIVERY**

Honorable Erithe A. Smith, Bankruptcy Judge  
U.S. Bankruptcy Court  
411 West Fourth St, Ctrm 5A  
Santa Ana, CA 92701

III. **SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **March 17, 2010** I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. *Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 17, 2010

Angela Antonio

/s/ Angela Antonio

Date

Type Name

Signature

In re:  
MARILYN FOX, et al. v. COLLIER MANAGEMENT, et al

Debtor(s).

Chapter 11 No. 09-14361-ES

Adv No. 8:09-ap-01562-ES

### NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled **ORDER APPROVING STIPULATION FOR DISMISSAL WITH PREJUDICE OF ADVERSARY PROCEEDING AND GRANTING DISMISSAL WITH PREJUDICE OF ADVERSARY PROCEEDING** as entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

**I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **March 17, 2010** the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

- Irving M. Gross img@lnbrb.com
- David L. Neale dln@lnbrb.com
- United States Trustee (SA) ustpreion16.sla.ecf@usdoj.gov

**II. SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

Philip D. Dapeer, Philip d. Dapeer a Law Corporation, 2625 Townsgate Rd., Ste. 330 Westlake Village, CA 91361

**III. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

*Philip D. Dapeer  
Philip D. Dapeer a Law Corporation  
2625 Townsgate Rd., Ste. 330  
Westlake Village, CA 91361*

## Appellate Docket Search

### Docket Information Case - 20090843

Utah Court of Appeals

Title: Collier v. Fox

Docket No: 20090843

Docket Date: 10/14/2009

Agency: THIRD DISTRICT, SALT LAKE

Case: 080926818

Status: Appellant Brief Filed

Date	Action	Disposition	Date
10/14/2009	Notice of Appeal Filed		
10/21/2009	Pourover to COA		
10/21/2009	Misc. Letter		
10/29/2009	Transcript Not Required		
10/29/2009	Docketing Statement Filed		
11/09/2009	Motion-Appellee-Summary Dispos	Deferred	02/10/2010
11/12/2009	Retention Ltr Denied/Not Filed		
11/12/2009	Received from Supreme Ct (Pour)		
11/12/2009	Call for Record Pursuant to R.		
11/16/2009	Record Filed - Pursuant to R.1		
11/27/2009	Extension of Time-Misc.	Granted	12/01/2009
12/01/2009	Extension Granted		
12/15/2009	Response to Motion for Summary		
12/21/2009	Consolidate-Courts Own Motion		
12/23/2009	Notice		
12/23/2009	Misc Motion	Denied	02/10/2010
01/05/2010	Misc. Order		
01/28/2010	Miscellaneous		
01/28/2010	Miscellaneous		
02/10/2010	Defer-Plenary Consideration Or		
02/10/2010	Misc Motion Denied		
02/10/2010	Perfect Record/Record Index Le		
02/16/2010	Record Index Filed		
02/17/2010	Set Briefing Schedule		
04/01/2010	Extension of Time for Appellan Stipulatio		04/01/2010
04/30/2010	Extension of Time for Appellan Granted		05/06/2010
05/06/2010	Extension Granted		
06/01/2010	Appellant's Brief Filed		
06/24/2010	Default-Brief on Disc		
01/01/3000	<del>Appellee's Brief Due</del>	<del>Due</del>	<del>07/08/2010</del>
01/01/3000	Brief on Disc-Due	Due	07/09/2010

□

New Search

# APPENDIX

“3”

SEP - 9 2009

SALT LAKE COUNTY

By \_\_\_\_\_ Deputy Clerk

ROBERT W. HUGHES #1573  
Attorney for Plaintiff  
438 East 200 South  
Salt Lake City, Utah 84111  
Telephone: (801) 364-9075  
Fax: (801) 364-9081

---

IN THE THIRD DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

COLLIER MANAGEMENT &  
DEVELOPMENT COMPANY, INC.,

Plaintiff,

vs.

JASON FOX; MARILYN FOX; STEVE  
FOX; CHRIS WRIGHT; and NOBLE  
HOUSE SERIES C, LLC,

Defendants.

**ORDER OF  
SUMMARY JUDGMENT**

Civil No. 080926818

Judge Kate Toomey

Based upon Plaintiff's Motion for Summary Judgment and Memorandum in Support, and Defendants, Jason Fox and Steve Fox's, failure to respond to Plaintiff's Motion, the Court having reviewed the pleadings and papers in file herein, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment is granted.
2. Plaintiff is awarded a judgment against Defendants Jason Fox and Steve Fox as follows:

(a) The principal amount of \$750,000.00;

(b) Accrued interest at the rate of two and one-half percent (2.5%) per month

from December 29, 2007 through June 29, 2008 in the amount of \$14,314.52



(c) Accrued interest at the rate of twenty percent (24%) per annum from June 30, 2008 through the date the Note is paid in full;

(d) Late fees pursuant to the Note in the amount of \$75,000.00;


3. Pursuant to the Promissory Note executed by Defendants Jason Fox and Steve Fox, Plaintiff is awarded a judgment against these Defendants for its court costs and attorney's fees in connection with this action in the amount of \$4,070.00.

4. Post judgment interest shall accrue on the entire judgment amount at the Promissory Note rate of twenty four percent (24%) per annum.

5. This judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or other wise as shall be established by affidavit.

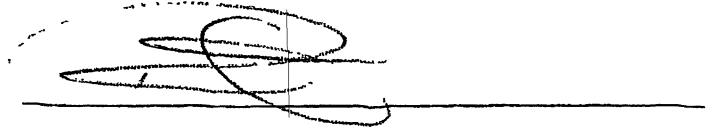
DATED this 9 day of August, 2009.

BY THE COURT:

  
\_\_\_\_\_  
HONORABLE KATE TOOMEY  
District Court Judge

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a copy of the foregoing **Order of Summary Judgment** to Jason Fox, 1285 East Elk Hollow Road, North Salt Lake, Utah 84054; and Steve Fox, 18377 Beach Blvd. #215, Huntington Beach, California 92648-1349, postage prepaid, this 4th day of August, 2009.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a copy of the foregoing **Motion for Summary Judgment or, in the alternative, Motion for Judgment on the Pleadings and Memorandum in Support**, to Jason Fox, 1285 East Elk Hollow Road, North Salt Lake, Utah 84054; and Steve Fox, 18377 Beach Blvd. #215, Huntington Beach, California 92648-1349, postage prepaid, this 13<sup>th</sup> day of July, 2009.

  
\_\_\_\_\_

# APPENDIX

“4”

ROBERT W. HUGHES #1573  
Attorney for Plaintiff  
438 East 200 South  
Salt Lake City, Utah 84111  
Telephone: (801) 364-9075  
Fax: (801) 364-9081

---

**IN THE THIRD DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH**

---

COLLIER MANAGEMENT &  
DEVELOPMENT COMPANY, INC.,

Plaintiff,

vs.

JASON FOX; MARILYN FOX; STEVE  
FOX; CHRIS WRIGHT; and NOBLE  
HOUSE SERIES C, LLC,

Defendants.

**MOTION FOR SUMMARY  
JUDGMENT OR, IN THE  
ALTERNATIVE, MOTION FOR  
JUDGMENT ON THE PLEADINGS  
AND MEMORANDUM IN SUPPORT**

Civil No. 080926818

Judge Kate Toomey

Plaintiff, by and through its attorney, hereby moves the Court for judgment on the pleadings or, in the alternative, for summary judgment against Defendants JASON FOX and STEVE FOX. Grounds for this Motion are as follows:

**UNDISPUTED FACTS**

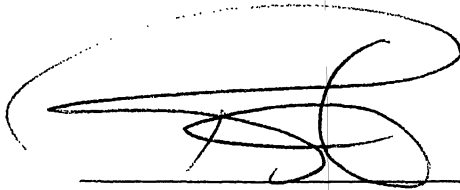
1. On or about December 29, 2007, said Defendants executed an Amended Trust Deed Note ("the Note") in favor of Plaintiff, a copy of the Note is attached hereto as Exhibit "A".

2. The Note provides, in relevant part:

NOW, THEREFORE, FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of COLLIER MANAGEMENT & DEVELOPMENT COMPANY,

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a copy of the foregoing **Motion for Summary Judgment** or, in the alternative, **Motion for Judgment on the Pleadings and Memorandum in Support**, to Jason Fox, 1285 East Elk Hollow Road, North Salt Lake, Utah 84054; and Steve Fox, 18377 Beach Blvd. #215, Huntington Beach, California 92648-1349, postage prepaid, this 13<sup>th</sup> day of July, 2009.



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# APPENDIX

“5”

FILED  
DISTRICT COURT

09 AUG 19 PM 2:07

1 Jason Fox  
2 1285 East Elk Hollow Road  
3 North Salt Lake, Utah 84054  
4 (H) • (C) 801-330-3191

5 Defendant In Pro Se

6  
7  
8 IN THE THIRD DISTRICT COURT  
9 IN AND FOR SALT LAKE COUNTY  
10 STATE OF UTAH  
11

12 COLLIER MANAGEMENT &  
13 DEVELOPMENT COMPANY, INC.,  
14 a Utah corporation

15 Plaintiff,

16 v.

17 JASON FOX; MARILYN FOX; STEVEN  
18 FOX; CHRIS WRIGHT and NOBLE  
19 HOUSE SERIES C, LLC, a limited liability  
20 company,

21 Defendants.

) Case No. 08 0926818

) Judge Kate Toomey

) **DECLARATION OF JASON  
FOX IN OPPOSITION TO  
NOTICE TO SUBMIT  
SUMMARY JUDGMENT OR  
IN THE ALTERNATIVE  
MOTION FOR JUDGMENT  
ON THE PLEADINGS, FOR  
DECISION**

22 **DECLARATION OF JASON FOX**

23 I, Jason Fox, declare:

- 24
- 25 1. I am a defendant in this case. I am a resident of Salt Lake City, Utah.
- 26
- 27 2. I have personal knowledge of the facts set forth in this declaration
- 28 and if called and sworn as a witness could and would competently testify thereto.

**DECLARATION**



1           3.     I give this declaration in opposition to the notice to submit for  
2     decision with respect to plaintiff's summary judgment motion or in alternative,  
3     motion for judgment on the pleadings, which I received by mail from attorney  
4     Robert Hughes on August 17, 2009.

5  
6           4.     I was outside the state of Utah on business in Laramie Wyoming  
7     during the week when attorney Robert Hughes apparently served and filed a  
8     motion for summary judgment or in the alternative, motion for judgment on the  
9     pleadings, on behalf of the plaintiff in this case.

10  
11          5.     My wife and I and our three young children reside at 1285 E. Elk  
12     Hollow Road, North Salt Lake, Utah 84054. My father is defendant Steven Fox.  
13     My mother, who is also a defendant in this action, is currently the debtor in certain  
14     Chapter 11 bankruptcy proceedings pending in the United States Bankruptcy  
15     Court, Central District of California, as a result of which the prosecution of this  
16     action as against her is stayed.

17  
18          6.     I did not discover the moving papers on the underlying motion for  
19     summary judgment, or in the alternative, motion for judgment on the pleadings,  
20     until September 17, 2009, when I received by mail plaintiff's notice to submit for  
21     decision, affidavit of attorney's fees and proposed judgment. I then immediately  
22     made inquiry of my wife, who told me for the first time that apparently the moving  
23     papers on the underlying motion had arrived while I was away on business and she  
24     had simply put them in a two-drawer file which I maintain in my office, and had  
25     forgotten to bring that mail to my attention when I returned to Utah. The package  
26     containing the motion papers was put in my two-drawer file in my office  
27     unopened, and I opened the package for the first time on August 17, 2009,  
28     immediately upon receipt of the notice to submit for decision and related

---

**DECLARATION**

1 documents which I did open from the mail from attorney Hughes on August 17,  
2 2009.

3  
4 7. Prior to August 17, 2009, I had no knowledge or information  
5 regarding the existence of the motion. Had I know of the motion, I certainly would  
6 have served and filed a timely response.

7  
8 8. Further, I received no communication from my father, Mr. Steven  
9 Fox, concerning the motion papers. I have read his accompanying declaration in  
10 this matter. Had my father received the papers on the motion, he certainly would  
11 have called to discuss the motion with me. In effect, because my father and I are  
12 party defendants in this case, we act as a check for each other to assure that we  
13 promptly comply with all of our responsibilities as party litigants in this case.

14  
15 9. I did not timely respond to the motion because I did not know of the  
16 envelope containing the motion papers that my wife had put in my two-drawer file  
17 cabinet in my office. I did not learn of the existence of that envelope until August  
18 17, 2009. My wife had forgotten to tell me about it, and I was given no reminder  
19 by my father, with whom I speak regularly on almost a daily basis.

20  
21 10. I have a meritorious defense in this action, as set out in my responses  
22 to written discovery. The last written communication from plaintiff's counsel that  
23 I was aware of was the written discovery that I received from attorney Robert  
24 Hughes. I timely responded to that discovery. At no time did I ever receive a  
25 telephone call or any other written inquiry from attorney Hughes regarding the  
26 summary judgment or summary adjudication motion, nor any communication from  
27 his office, written or oral, regarding the status of my opposition papers. I have  
28 timely responded to the complaint in this case, and certainly take seriously the

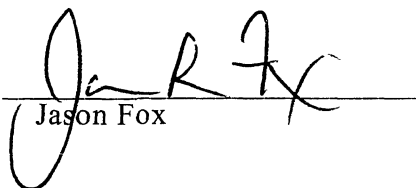
**DECLARATION**

1 responsibilities of a litigant in civil litigation matters. My wife's failure to bring  
2 the mail to my attention was an inadvertent mistake, and I address the matter  
3 promptly in this declaration. My wife is not a party to this case. She is not familiar  
4 with lawsuit papers. She is a housewife who takes care of our children. She would  
5 not know the significance of what was sent to me by plaintiff's counsel.  
6

7 11. I request leave of court to be able to respond substantively to the  
8 motion within what would otherwise be the statutory time period to opposition to a  
9 motion.  
10

11 Executed at Salt Lake City, Utah this 18<sup>th</sup> of August, 2009.  
12

13 I declare under penalty of perjury under the laws of the state of Utah that the  
14 foregoing is true and correct.  
15

16   
17 Jason Fox  
18  
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**DECLARATION**

1 **PROOF OF SERVICE**

2  
3 I am employed in the County of Salt Lake City, State of Utah. I am over the  
4 age of 18 and a defendant in the within action; my address is 1285 East Elk Hollow  
Road, North Salt Lake, Utah 84054.

5 On August 18, 2009, I served the foregoing document described as

6  
7 **DECLARATION OF JASON FOX IN OPPOSITION TO NOTICE TO**  
8 **SUBMIT SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION**  
9 **FOR JUDGMENT ON THE PLEADINGS, FOR DECISION**

10 on the interested parties in this action by placing a true copy thereof enclosed in a  
11 sealed envelope addressed as follows:

12 **SEE ATTACHED MAILING LIST**

13 [X] (BY MAIL) I deposited such envelope in the mail at North Salt Lake, Utah.  
14 The envelope was mailed with postage thereon fully prepaid.

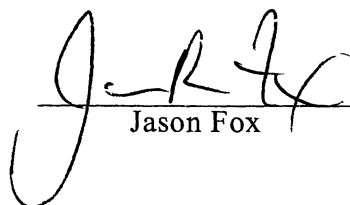
15 I am readily familiar with the firm's practice of collection and processing  
16 correspondence for mailing. Under that practice it would be deposited with  
17 U.S. postage service on same day with postage thereon fully prepaid at  
North Salt Lake, Utah, in the ordinary course of business. I am aware that  
on motion of the party served, service is presumed invalid if postal  
cancellation date or postage meter date is more than one day after date of  
deposit for mailing in affidavit.

18 [ ] (BY FACSIMILE) I caused such document to be sent via facsimile  
19 transmission on this date during regular business hours to the addressee(s)  
20 as shown above. The facsimile machine utilized complies with California  
Rules of Court 2003(3) and no error was reported by the machine. Pursuant  
to California Rules of Court 2008(4), I caused the machine to print a  
transmission record of the transmission.

21 [ ] (BY PERSONAL DELIVERY) I delivered such envelope by personal  
22 delivery to the offices of the addressee(s).

23 Executed on August 18, 2009, at North Salt Lake, Utah.

24 [XX] I declare under penalty of perjury that the foregoing is true and correct.

25  
26   
27 Jason Fox  
28

DECLARATION

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**MAILING LIST**

*Collier Management v. Jason Fox*

Case No: 08 0926818

Robert W. Hughes  
438 East 200 South  
Salt Lake City, Utah 84111

---

**DECLARATION**

# APPENDIX

“6”

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

APPEALED: CASE #20090843

COLLIER MANAGEMENT & DEVELOPME vs. JASON FOX

CASE NUMBER 080926818 Contracts

---

CURRENT ASSIGNED JUDGE  
KATE TOOMEY

PARTIES

Plaintiff - COLLIER MANAGEMENT & DEVELOPME  
Represented by: ROBERT W HUGHES

Defendant - JASON FOX

Defendant - MARILYN FOX

Defendant - STEVE FOX

Defendant - CHRIS WRIGHT

Defendant - NOBLE HOUSE SERIES C LLC

Other Party - PHILIP D DAPEER

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	380.00
	Amount Paid:	380.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT 10K-MORE

	Amount Due:	155.00
	Amount Paid:	155.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: APPEAL

	Amount Due:	225.00
	Amount Paid:	225.00
	Amount Credit:	0.00
	Balance:	0.00

CASE NOTE

CASE NUMBER 080926818 Contracts

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## PROCEEDINGS

12-31-08 Filed: Complaint 10K-MORE  
12-31-08 Case filed  
12-31-08 Judge KATE TOOMEY assigned.  
12-31-08 Fee Account created Total Due: 155.00  
12-31-08 COMPLAINT 10K-MORE Payment Received: 155.00  
Note: Code Description: COMPLAINT 10K-MORE  
01-09-09 Filed return: Twenty Day Summons on return  
Party Served: WRIGHT, CHRIS  
Service Type: Personal  
Service Date: January 06, 2009  
01-09-09 Filed return: Twenty Day Summons on return (Chris Wright,  
agent)  
Party Served: NOBLE HOUSE SERIES C LLC  
Service Date: January 06, 2009  
01-15-09 Filed return: Twenty day summons on return - Jason Fox  
Party Served: Jason Fox  
Service Type: Personal  
Service Date: January 08, 2009  
02-15-09 Filed: Affidavit of attorney's fees and costs  
02-15-09 Filed: Memorandum of costs and disbursements  
02-17-09 Filed: Default certificate - Chris Wright  
02-23-09 Filed: Military Service Affidavit and order  
Judge KATE TOOMEY  
Signed February 23, 2009  
02-23-09 Filed order: Default judgment  
Judge KATE TOOMEY  
Signed February 23, 2009  
02-23-09 Case Disposition is Judgment  
Disposition Judge is KATE TOOMEY  
02-24-09 Filed return: Acceptance of service - Jason Fox, Marilyn Fox,  
Steve Fox and Noble House Series C, LLC  
Party Served: Philip Dapeer, attorney  
Service Type: Personal  
Service Date: February 16, 2009  
02-26-09 Judgment #1 Entered \$ 993850.97  
Creditor: COLLIER MANAGEMENT & DEVELOPME  
Debtor: CHRIS WRIGHT  
14,314.52 Interest  
750,000.00 Principal  
153,421.45 Interest  
945.00 Attorneys Fees  
75,000.00 Late Fees  
170.00 Costs  
993,850.97 Judgment Grand Total  
02-26-09 Filed judgment: Default Judgment @J  
Judge KATE TOOMEY  
Signed February 23, 2009



03-18-09 Filed: Answer to complaint

JASON FOX

MARILYN FOX

STEVE FOX

NOBLE HOUSE SERIES C LLC

03-24-09 Notice - NOTICE for Case 080926818 ID 12008778

We are unable to enter the default judgment/certificate in this case for the following reasons:

An Answer has been filed by the defendant.

Date: \_\_\_\_\_

\_\_\_\_\_  
District Court Clerk

03-25-09 Filed: Motion to Strike Answer, for Entry of Default, and for Attorney's Fees and Memorandum in Support

Filed by: HUGHES, ROBERT W

03-30-09 Filed: Answer

JASON FOX

03-30-09 Filed: Answer

MARILYN FOX

03-30-09 Filed: Answer

STEVE FOX

04-06-09 Filed: Notice to Submit for Decision (pl's Motion to Strike Answer, for Entry of Default . . . )

04-06-09 Filed: Notice to Submit for Decision (Motion to Strike Answer, for Entry of Default, and for Attorney's Fees, and Memorandum in Support)

04-07-09 Filed: Opposition to Motion to Strike (Jason Fox)

04-07-09 Filed: Opposition to Motion to Strike (Marilyn Fox)

04-07-09 Filed: Opposition to Motion to Strike (Steven Fox)

04-09-09 Filed: Motion to strike answers, for entry of defaults, and for attorney's fees, and memorandum in support

Filed by: HUGHES, ROBERT W

04-09-09 Filed: Affidavit of attorney's fees and costs

04-16-09 Notice - NOTICE for Case 080926818 ID 12065518

We are unable to enter the default judgment/certificate in this case for the following reasons:

An Answer has been filed by the defendant.

Date: \_\_\_\_\_

District Court Clerk

04-17-09 Filed order: Memorandum Decision (Motion to Strike granted; the Foxes may file pro se answers; House Series C LLC's default entered; request for aty fees denied)

Judge KATE TOOMEY

Signed April 16, 2009

04-20-09 Filed: Objection to Motion to Strike Answer and for Entry for Defaults and for Attorney's Fees (Marilyn Fox)

04-20-09 Filed: Objection to Motion to Strike Answer and for Entry for Defaults and for Attorney's Fees (Steven Fox)

04-20-09 Filed: Objection to Motion to Strike Answer and for Entry for Defaults and for Attorney's Fees (Jason Fox)

04-29-09 Filed: Notice of Rule 26 Discovery Provisions Exemption

04-30-09 Filed order: Default Judgment (Noble House Series C, LLC)

Judge KATE TOOMEY

Signed April 30, 2009

05-05-09 Judgment #2 Entered \$ 993251.02

Debtor: NOBLE HOUSE SERIES C LLC

Creditor: COLLIER MANAGEMENT & DEVELOPME

14,314.52 Interest

750,000.00 Principal

152,500.00 Interest

1,242.50 Attorneys Fees

75,000.00 Late Fees

194.00 Costs

993,251.02 Judgment Grand Total

05-05-09 Filed judgment: Default Judgment @J

Judge KATE TOOMEY

Signed April 30, 2009

05-21-09 Filed: Certificate of Service

06-17-09 Filed: Certificate of service (Pltf's first set of request for admissions Interrogatories )

06-19-09 Filed: Responses to Discovery (Jason Fox)

06-19-09 Filed: Responses to Discovery (Steven Fox)

07-15-09 Filed: Motion for Summary Judgment or, in the alternative, Motion for Judgment on the Pleadings and Memorandum in Support  
Filed by: HUGHES, ROBERT W

08-06-09 Filed: Affidavit of attorney's fees and costs

08-06-09 Filed: Notice to Submit for decision - Motion for summary

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judgment or in the alternative motion for judgment on the pleadings

08-19-09 Filed: Declaration of Jason Fox in Opposition to Notice to Submit Summary Judgment or in the Alternative Motion for Judgment on the Pleadings, for Decision

08-19-09 Filed: Declaration of Steven Fox in Opposition to Notice to Submit Summary Judgment or in the Alternative Motion for Judgment on the Pleadings, for Decision

08-31-09 Filed: Response to oppositions to submission of motion for summary judgment

09-09-09 Filed order: Order of Summary Judgment  
Judge KATE TOOMEY  
Signed September 09, 2009

09-10-09 Judgment #3 Entered \$ 843384.52  
Creditor: COLLIER MANAGEMENT & DEVELOPME  
Debtor: JASON FOX  
Debtor: STEVE FOX  
750,000.00 Principal  
14,314.52 Interest  
4,070.00 Attorneys Fees  
75,000.00 Late Fees  
843,384.52 Judgment Grand Total

09-10-09 Filed judgment: Order of Summary Judgment @J  
Judge KATE TOOMEY  
Signed September 09, 2009

09-18-09 Filed: Notice of Entry of Judgment

10-09-09 Filed: Notice of Appeal - Steven R. Fox

10-09-09 Filed: Notice of Appeal - Jason R. Fox

10-09-09 Fee Account created Total Due: 225.00

10-09-09 APPEAL Payment Received: 225.00  
Note: Code Description: APPEAL

10-13-09 Note: Cert/Copy of Notice of Appeal x 2 forwarded to Utah Court of Appeals

10-21-09 Issued: Supplemental Order - Jason Fox & Steve Fox  
Clerk dorian  
Hearing Date: November 17, 2009 Time: 14:00

10-29-09 Filed: Letter from Supreme Court to Mr. Fox (Steven) advising that the appeal has been filed. 20090843

10-29-09 Filed: Supreme Court Order - effective twenty days from the date of this order this appeal (Jason Fox) will be transferred to the Court of Appeals. 20090844

10-29-09 Filed: Supreme Court letter to Mr. Jason Fox advising that the notice of appeal has been filed in case # 20090844

10-29-09 Filed: Supreme Court Order - effective twenty days from the date of the order this appeal (Steven Fox) will be transferred to the Court of Appeals. 20090843

11-03-09 Filed return: Supp Order - Jason Fox @V  
Party Served: FOX, JASON  
Service Type: Personal

Service Date: October 26, 2009

11-04-09 SUPPLEMENTAL ORDER scheduled on November 17, 2009 at 02:00 PM  
in Third Floor - W32.  
11-16-09 Note: Sue @ Court of Appeals request record "as is". Files -2  
sent to COA 20090844 CA  
11-17-09 Minute Entry - Minutes for Supplemental Order  
Judge: JUDGE COLLECTION  
Clerk: mattheww  
PRESENT  
Defendant(s): JASON FOX  
Plaintiff's Attorney(s): ROBERT W HUGHES

---

HEARING

Defendant(s) appeared, answered the Attorney's questions and was  
excused.  
11-18-09 Filed: Utah Court of Appeals-Letter to Mr. Fox-Case has been  
assigned, please reflect Case Number 20090843-CA on any future  
filings  
11-18-09 Note: Appealed: Case #20090843  
11-18-09 Note: Appellate Number 20090844 Is attached to the Seperate  
Appeal filed by Jason Fox.  
12-22-09 Filed: Court of Appeals - Order of Consolidation - appeal #  
20090843 & 20090844 are consolidated into appeal # 20090843 CA  
02-10-10 Filed: Utah Court of Appeals-Letter to Third District Appeals  
Clerk-Return Record, Request for Indexing  
02-11-10 Note: Cert/Copy of Record Index has been forwarded to Utah  
Court of Appeals

# APPENDIX

“7”

Steven Fox  
18377 Beach Boulevard  
Suite 215  
Huntington Beach, CA 92648  
(O) 714-848-3200 • (C) 714-803-5000

Defendant In Pro Se

IN THE THIRD DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH

COLLIER MANAGEMENT &  
DEVELOPMENT COMPANY, INC.,  
a Utah corporation

Plaintiff,

v.

JASON FOX; MARILYN FOX; STEVEN FOX; CHRIS WRIGHT and NOBLE HOUSE SERIES C, LLC, a limited liability company,

Defendants.

Case No. 08 0926818

Judge Kate Toomey

**DECLARATION OF STEVEN  
FOX IN OPPOSITION TO  
SUBMISSION OF MOTION  
FOR SUMMARY  
JUDGMENT OR MOTION  
FOR JUDGMENT ON THE  
PLEADINGS FOR DECISION**

## DECLARATION OF STEVEN FOX

I, Steven Fox, declare:

1. I am a defendant in this case. I have personal knowledge of the facts set forth in this declaration and if called and sworn as a witness could and would competently testify thereto.

## DECLARATION

1           2.     I give this declaration in opposition to the motion for summary  
2 judgment or in the alternative, motion for judgment on the pleadings, which is the  
3 subject of the notice to submit for decision, dated August 4, 2009.

4  
5           3.     Simply put, I was never served with the moving papers on the motion  
6 for summary judgment or the motion for judgment on the pleadings and I have  
7 never received them from plaintiff's counsel. The first notice that I had of the  
8 motion was my receipt on August 17, 2009, by mail from attorney Robert W.  
9 Hughes, of the notice to submit for decision and the affidavit for attorney's fees  
10 and costs. Included within that material was a proposed order of summary  
11 judgment. I received those materials at my business address, being 18377 Beach  
12 Blvd., Suite 215, Huntington Beach, California 92648-1349.

13  
14           4.     Although Mr. Hughes apparently claims that he mailed those papers  
15 to me on the fourth day of August, 2009, I do not believe that his proof of mailing  
16 is accurate, because I did not receive the papers until August 17, 2009.

17  
18           5.     I have timely responded to all other proceedings in this case.

19  
20           6.     The first actual notice that I had of anything having to do with a  
21 motion for summary judgment or motion for judgment on the pleadings was the  
22 receipt of the notice to submit for decision, as set forth in this declaration.

23  
24           7.     I have a meritorious defense to this action, as set forth in my answers  
25 to written discovery propounded by plaintiff to me.

26  
27           8.     The last pleading that I have received in this case from attorney  
28 Hughes was written discovery that he propounded to the defendants, as to which I

1 gave timely responses, including a production of documents consisting of my  
2 records and files in the underlying transaction that is the subject of this action.

3  
4 9. I have yet to see the moving papers on the summary judgment motion  
5 or the motion for judgment on the pleadings so I cannot respond substantively in  
6 these papers.

7  
8 10. I reside in Orange County, California and am a California resident. I  
9 have never been a resident of the state of Utah.

10  
11 11. I request that I be given the statutory period of time within which to  
12 respond to the motion for summary judgment or motion for judgment on the  
13 pleadings after I have been properly served with the motion papers by plaintiff's  
14 counsel.

15  
16 12. At no time did I ever receive any written or oral communication from  
17 attorney Hughes making inquiry as to whether or not I had received the moving  
18 papers on the motion and the status of my opposition. Again, the only  
19 communications that I have received from Mr. Hughes since his service of the  
20 written discovery in this case was the notice to submit for decision and related  
21 documents, which I received by mail from him at my office on August 17, 2009.

22  
23 13. I have read the accompanying declaration of my son, Mr. Jason Fox.  
24 The statements in that declaration about me are correct. Had I received the motion  
25 papers, I certainly would have called to discuss them with Jason. In that fashion, he  
26 would have been alerted to the situation, and would have been able to discover the  
27 unopened package in his file cabinet in time to be able to submit substantive  
28 opposition to the motion. I talk with my son on almost a daily basis about business

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**DECLARATION**



1 matters. He, similarly, would have alerted me to the existence of the motion, and I  
2 would have then made inquiry of plaintiff's counsel. The fact is that I was never  
3 served with the motion papers, and because of my daughter-in-law's inadvertence,  
4 Jason and I were not able to act as a safety net for each other, in terms of attending  
5 to our responsibilities as litigants in this case.

6  
7 Executed at Huntington Beach, California this 18<sup>th</sup> of August, 2009.

8  
9 I declare under penalty of perjury under the laws of the state of Utah that the  
10 foregoing is true and correct.

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12   
13 Steven Fox

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**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and a defendant in the within action; my address is 18377 Beach Boulevard, Suite 215, Huntington Beach, CA 92648.

On August 18, 2009, I served the foregoing document described as

**DECLARATION OF STEVEN FOX IN OPPOSITION TO SUBMISSION  
OF MOTION FOR SUMMARY JUDGMENT OR MOTION FOR  
JUDGMENT ON THE PLEADINGS FOR DECISION**

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

**SEE ATTACHED MAILING LIST**

[X] (BY MAIL) I deposited such envelope in the mail at Huntington Beach, California. The envelope was mailed with postage thereon fully prepaid.

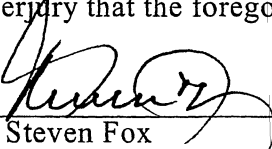
I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postage service on same day with postage thereon fully prepaid at Huntington Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (BY FACSIMILE) I caused such document to be sent via facsimile transmission on this date during regular business hours to the addressee(s) as shown above. The facsimile machine utilized complies with California Rules of Court 2003(3) and no error was reported by the machine. Pursuant to California Rules of Court 2008(4), I caused the machine to print a transmission record of the transmission.

[ ] (BY PERSONAL DELIVERY) I delivered such envelope by personal delivery to the offices of the addressee(s).

Executed on August 18, 2009, at Huntington Beach, California.

[xx] I declare under penalty of perjury that the foregoing is true and correct.

  
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Steven Fox

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**MAILING LIST**

*Collier Management v. Jason Fox*

Case No: 08 0926818

Robert W. Hughes  
438 East 200 South  
Salt Lake City, Utah 84111